would be no less onerous than the one under discussion. Presumably, however, such a covenant would be enforced; for the present rule affects only agreements restricting the mortgagor's rights in the particular property he mortgages. In fact, in a decision rendered pending the appeal to the House of Lords in the principal case, the rule was held to be limited to agreements enforceable specifically in equity against that property. *Carritt* v. *Bradley*, [1901] 2 K. B. 550 (C. A.). The mortgage was of a stockholder's controlling interest in a company. The court sustained the mortgagor's collateral agreement to use this interest always thereafter to secure employment for the mortgagee by the company. There seems to be no true distinction from *Noakes* v. *Rice*, *supra*, for whether the remedy for breach is equitable or merely legal does not concern a mortgagor who keeps his promise. In one case as much as in the other his use of the property is hampered. A recent Irish case approved in the judgment of the House of Lords in *Noakes* v. *Rice*, *supra*, does not recognize any such distinction. *Browne* v. *Ryan*, [1901] 2 I. R. 653.

Whether American courts will have to solve the complexities suggested by these cases and how they may do it is conjectural, for the whole doctrine seems yet undeveloped here. *Cf. Uhlfelder* v. *Carter's Admr.*, 64 Ala. 527; *Northwestern, etc., Ins. Co.* v. *Butler*, 57 Neb. 198.

MEASURE OF DAMAGES ON A CONTRACT WHEN THE DISCHARGED EMPLOYEE GOES TO WORK FOR HIMSELF. — In an action by an employee for breach of the contract of service, the law aims to compensate him for his actual loss. *Goodman* v. *Pocock*, 15 Q. B. 576. It is, however, his duty, under the doctrine of avoidable consequences, to use reasonable care to reduce his damage by securing other employment; and the amount that he can recover is limited to the difference between what he would have received under the contract, and what he has earned or might with due diligence have earned elsewhere during the term of the employment. *Ream* v. *Watkins*, 27 Mo. 516; *Dickinson* v. *Talmage*, 138 Mass. 249. A nice question is presented when the injured party, instead of entering the service of some one else or remaining idle, goes to work on his own account. It has recently been decided that in such a case the amount recoverable is the difference between the contract price, and what must have been paid to another to do the work that the injured party has done in his own business. *Lee* v. *Hampton*, 30 So. Rep. 721 (Miss.). Only two cases with similar facts have been found. *Huntington* v. *Ogdensburgh*, 3 How. Pr. (N. Y.) 416; *Harrington* v. *Gies*, 45 Mich. 374. The first is in agreement with the principal case, while the second allows no deduction whatever. It does not appear in any of these cases whether the total profits of the injured party in his own business were greater or less than the sum that he would have had to pay a servant to take his place in conducting it. If they are greater it is obvious that the surplus ought not to be considered in mitigation of his damages, because he might have invested in the business even if he had continued in the defendant's employ and thus have earned that amount in any event. When this is the case, and also when the profits of the business and the value of his labor are equal, the rule in the principal case produces the correct result, awarding to the injured party the amount of his actual loss. But when the profits are less than the value of his labor the rule

seems to fail. In such a case the loss to the plaintiff is the difference between the contract price and the actual profits, rather than the value of his labor, and that amount he ought to recover. Since the object of the law is to make the injured party whole, it would seem that the true measure of damages in cases of this kind is, the difference between what he would have received under the contract, and the amount that he has earned or might with due diligence have earned elsewhere and which he could not have earned if he had continued in the defendant's service under the contract

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CONCERNING THE SURETY OF A BANKRUPT. — In a recent federal case a creditor had innocently received, by way of preference, part payment of a note which was one of several debts due him. The debtor having become bankrupt, his surety paid the balance due on the note. Though the surety had claims on other debts due to himself, the court ruled that he should pay in the amount of the preference before he could make any proof against the estate, and put no such condition on the creditor. *In re Siegel-Hillman, etc., Co.*, 111 Fed. Rep. 980 (Dist. Ct., E. D. Mo.). The court argues that if the creditor were obliged to refund the preference and accept a dividend from the bankrupt's estate, the surety being solvent would ultimately be obliged to make up to the creditor the full amount of the note, and take a dividend from the estate by way of subrogation. The final result would be the same as if the surety refunded the preference at once, and took his dividend, and since the rights of other creditors would not be affected, the court having equity powers could simplify the means to the end. Section 57 *i* of the Bankruptcy Act provides that if a surety discharge his undertaking to a creditor of a bankrupt "in whole or in part, he shall be subrogated to that extent to the rights of the creditor." This provision is taken to mean that the surety can proceed only by subrogation. Such a suit being in the right of the creditor, the fact that the latter has received a preference, and cannot prove unless it is paid back is a complete defence. *Morgan* v. *Wordell*, 178 Mass. 350. There seems to be no reason, however, for not allowing proof of the surety's other claims in his own right.

But in addition to this it is difficult to see why the court should care whether the creditor or the surety pays back the preference. The court says that if the creditor does so, the debt will not in equity be considered paid, and the original maker, and consequently the surety co-maker, will still be liable. To support this proposition the court cites *Bartholow* v. *Bean*, 18 Wall. 635. That case decided merely that a preference which the trustee in bankruptcy could set aside is not the less void because there is a solvent surety on the obligation. In the principal case, as the court agrees, the creditor cannot be deprived of the preference, which he took in good faith. But if he wishes to prove other claims he must refund it. Section 57 *g*. The court ruled in the course of the opinion that the surety need not turn in the amount of a preference to an innocent creditor, on whose claim also he was bound, but all of whose debts had been paid in full by the preference. These two rulings make the surety's release depend on the accident of the creditor having other claims against the principal debtor, and therefore having a motive for surrendering his preference. It is submitted that such other claims, with which the surety has nothing to do, should not be considered in determining his rights.